

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	EB Docket No. 07-147
	)	
<b>PENDLETON C. WAUGH, CHARLES M.</b>	)	File No. EB-06-IH-2112
<b>AUSTIN, and JAY R. BISHOP</b>	)	NAL/Acct. No. 200732080025
	)	
<b>PREFERRED COMMUNICATION</b>	)	FRN No. 0003769049
<b>SYSTEM, INC.</b>	)	
	)	
Licensee of Various Site-by-Site Licenses	)	
in the Specialized Mobile Radio Service	)	
	)	
<b>PREFERRED ACQUISITIONS, INC.</b>	)	FRN No. 0003786183
	)	
Licensee of Various Economic Area Licenses	)	
in the 800 MHz Specialized Mobile Radio	)	
Services	)	

To: The Honorable Judge Arthur I. Steinberg

**OPPOSITION TO ENFORCEMENT BUREAU'S MOTION FOR RULING**

Preferred Communication Systems, Inc. ("PCSI"), by its attorneys, hereby submits this Opposition to the Enforcement Bureau's ("Bureau") Motion for Ruling ("Motion") filed November 9, 2007.<sup>1</sup> In the Motion, the Bureau explains that out of the 143 requests for admissions which the Bureau served upon PCSI, PCSI answered only 141 and had the temerity to object to two – specifically, requests nos. 80 & 81. As the Motion indicates, PCSI objected to those two on the grounds of relevance. As discussed herein, those two particular requests are completely irrelevant, and there is no basis to compel PCSI to respond to them.

**BACKGROUND**

A short summary of the issues in this proceeding are in order, to frame the narrower issue of relevancy of the two requests. In this proceeding, there are two separate and distinct sets of

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<sup>1</sup> The Bureau also filed a motion for leave to file its Motion. PCSI does not oppose the motion for leave to file.

licenses at issue. The first set of licenses consists of so-called “site-based” 800 MHz SMR licenses, all of them held directly in the name of PCSI. These licenses pre-date the era of auctions, and all of them were originally issued by the FCC based upon applications for authority to construct and operate at a single, specific site (hence the name, “site-based”). *Those applications did not require an applicant to certify financial qualifications.* The protected geographic area of site-based licenses is measured as a radius around the coordinates (*i.e.*, the latitude and longitude) of the site. The vast bulk of these licenses were acquired by PCSI in the late 1990s.

The second set of licenses are all licenses held in the name of PCSI’s wholly-owned subsidiary, Preferred Acquisitions, Inc. (“PAI”), all of which were acquired by PAI in FCC Auction No. 34, and for which PAI paid the FCC over \$31,000,000 cash. They were not issued until December 20, 2000. The protected geographic area of these auction licenses is measured by reference to political boundaries, *i.e.*, county lines. Because, shortly after pocketing PAI’s money, the FCC initiated a rulemaking proceeding which proposed to gut the value of the licenses which PAI had just purchased,<sup>2</sup> the FCC also said it would consider petitions for extensions of time to meet construction deadlines from Auction No. 34 licensees.

Each of the site-based licenses, virtually all of which had originally been issued in the 1990s or before, had been required to be placed into operation from its authorized location within one year of original grant (unless such period was extended, as was the case for many), and each

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<sup>2</sup> That rulemaking proceeding is WT Docket No. 02-55, *Improving Public Safety Communications in the 800 MHz Band*. In August, 2004, the FCC adopted rules which did indeed completely gut the value of the PAI licenses and made it impossible for PCSI and its subsidiary to accomplish their original plans in the time frame originally contemplated by them. Later, the FCC made several reconsideration decisions, either on its own motion or in response to petitions for reconsideration, which slightly ameliorated the original impact, but which still represented an arbitrary and unfair result in the view of PCSI, which sought appellate review. That appellate review remains pending before the US Court of Appeals for the DC Circuit, because certain unrelated persons have chosen to file still further petitions for reconsideration of WT Docket No. 02-55 before the FCC, and the FCC’s counsel before the Court successfully obtained a stay of PCSI’s appeal pending disposition of those petitions, leaving PCSI and PAI in limbo.

of them had been certified to the FCC as constructed and operational timely (*i.e.*, within the applicable deadline, including any extensions the FCC had granted). Even after being constructed and placed into operation, these site-based licenses were subject to a rule of operation, specifically, Section 90.157 of the Commission's Rules, which specified that if a station was taken out of operation for twelve continuous months, it canceled automatically.

The auction licenses, in contrast, offered licensees the option of having a single "substantial service" construction deadline at the five-year anniversary (which PAI selected). Those auction licenses had been the subject of a timely filed waiver/extension request from PAI,<sup>3</sup> and PAI had never claimed to the FCC to have placed them into operation. Moreover, once constructed and placed into operation to meet the five-year deadline, FCC rules permit such auction licenses to be de-constructed and taken out of operation for several years at a time without jeopardizing the license.<sup>4</sup>

Because of the different posture of these two sets of licenses, the *Hearing Designation Order* herein<sup>5</sup> treated them differently. There was no question that PCSI had built and placed into operation all of its site-based licenses, and the *HDO* did not specify any issue as to whether those licenses had originally been timely constructed. Rather, based upon evidence from the owners of the towers in Puerto Rico/Virgin Islands where these PCSI licenses were licensed, the *HDO*, ¶ 50, focused on whether those licenses had been de-constructed around December, 2005, and have remained de-constructed since then, which would subject them to cancellation under the provisions of Section 90.157. Specifically, the *HDO* said:

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<sup>3</sup> The PAI waiver request pertained only to the PAI auction licenses. It did not seek any form of waiver or relief with respect to the PCSI site-based licenses.

<sup>4</sup> Such licenses may be renewed even unconstructed, if there is no competing application filed against the renewal application. Even then, so long as they are back on the air and able to make a showing they are then being used to serve the public at the ten-year renewal date, they receive a decisive renewal expectancy over any competing application. The FCC made the policy choice to treat such auction licensees that way, based on the fact the licenses were purchased at auction.

<sup>5</sup> *Order to Show Cause and Notice of Opportunity for Hearing*, FCC 07-125, released July 20, 2007 ("*HDO*").

Under Section 90.157 of the Commission's Rules, by operation of law, a wireless licensee's licenses cancel for discontinuation if the licensee has failed to operate its licenses for over one year and not obtained permission from the Commission to discontinue such operation. \* \* \* Information from several tower operators in Puerto Rico and the U.S. Virgin Islands indicates that PCSI ceased to be a customer of the tower operators since at least December 2005. \* \* \* The evidence suggests that PCSI has discontinued operation of its licenses for at least one year, without informing the Commission of its intent to do so. If it is determined that PCSI has not operated its licenses, then, by operation of law, the licenses shall cancel. Accordingly, issues will be specified below to determine whether, in fact, the licensee has permanently discontinued operation of its licenses for more than one year. If it is found that PCSI has done so, then the licenses shall automatically cancel. *Therefore, as to this matter, the only issue for the Presiding Judge to determine is whether the licensee discontinued the operation of its licenses for more than one year.*

(Footnote omitted; emphasis added.)

The Bureau directed two requests to PCSI which were relevant to the above-stated hearing issue – requests nos. 83 & 84, both of which were answered by PCSI without objection. Bureau request no. 83 reads: “PCSI has not operated any of the licenses listed in items numbers 1 through 77 above since December 2005.” (PCSI denied this request.) Bureau request no. 84 reads: “Between December 2005 and the present, PCSI discontinued operation for more than one year of each of the licenses listed in item numbers 1 through 77 above.” (PCSI admitted this request.)

It is with this background in mind that we may turn to the issue of whether the Bureau's Motion, pertaining to its requests nos. 80 & 81, has any merit.

#### **THE TWO REQUESTS GO BEYOND THE DESIGNATED ISSUES**

Request no. 80 reads: “To date, PCSI does not hold funds or funding commitments necessary to complete construction of facilities for each of the licenses listed in item number 1 through 77 above.” However, the question of whether construction was ever completed for these licenses is not at issue in this proceeding. The *HDO*, ¶ 50, acknowledged that each of these 77 licenses had been constructed and operated – indeed, the *HDO* acknowledged that the various site lessors had once had agreements with PCSI and that facilities had once existed for each of

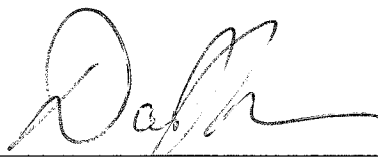
them. *Id.* There being no issue as to whether these licenses had originally been constructed, *ipso facto*, there is no issue whether PCSI had the funds to construct them.

Request no. 81 reads as follows: "To date, PCSI has not secured the funding necessary to continuously operate facilities for each of the licenses listed in item numbers 1 through 77 above." However, PCSI never made any financial certification respecting these licenses, nor was it obligated to do so under any Commission rule. Therefore, whether PCSI has a commitment for funding to re-construct and operate any of these site-based licenses is totally irrelevant to any of the designated issues.

### CONCLUSION


As the two involved Bureau requests for admission are totally irrelevant to any of the issues designated in the *HDO*, and specifically run counter to the Commission's express instructions in ¶ 50 thereof, the Bureau's Motion should be denied, and the Bureau instructed to limit its future discovery requests accordingly.

Respectfully submitted,  
**PREFERRED COMMUNICATION SYSTEMS, INC.**

By:   
David J. Kaufman

Brown Nietert & Kaufman, Chartered  
1301 Connecticut Ave. N.W., Suite 450  
Washington, D.C. 20036  
Telephone: 202-887-0600  
E-Mail: [david@bnkcomlaw.com](mailto:david@bnkcomlaw.com)

November 16, 2007

By:   
Robert J. Keller

Law Offices of Robert J. Keller, P.C.  
P.O. Box 33428  
Washington, D.C. 20033-0428  
Telephone: 202-223-2100  
Email: [rjk@telcomlaw.com](mailto:rjk@telcomlaw.com)

Its Attorneys

**CERTIFICATE OF SERVICE**

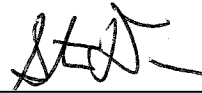
I, Steve Denison, a paralegal at the law firm of Brown, Nietert & Kaufman, Chartered, hereby certify that I have caused a copy of the foregoing **"OPPOSITION TO ENFORCEMENT BUREAU'S MOTION FOR RULING"** to be sent by electronic mail, this 16<sup>th</sup> day of November, 2007, to the following:

Hon. Arthur I. Steinberg  
Administrative Law Judge  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 1-C861  
Washington, D.C. 20554  
[Arthur.steinberg@fcc.gov](mailto:Arthur.steinberg@fcc.gov)

Mr. William D. Silva  
Law Offices of William D. Silva  
5335 Wisconsin Ave., N.W., Suite 400  
Washington, D.C. 20015-2003  
[bill@luselaw.com](mailto:bill@luselaw.com)

Mr. Jay R Bishop  
1190 S. Farrell Drive  
Palm Springs, CA 92264  
[jaybishopp@aol.com](mailto:jaybishopp@aol.com)

Gary A. Oshinsky, Attorney  
Anjali K. Singh, Attorney  
Enforcement Bureau  
Investigations and Hearing Division  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 4-C330  
Washington, D.C. 20554  
[Gary.oshinsky@fcc.gov](mailto:Gary.oshinsky@fcc.gov)  
[Anjali.singh@fcc.gov](mailto:Anjali.singh@fcc.gov)



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Steve Denison